No. 9557

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA,

Appellant,

vs.

ESTELLE CAMPBELL,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. CHARLES D. CAVANAH, *District Judge*

BRIEF FOR APPELLEE, ESTELLE CAMPBELL

JONES & BRONSON,
WHEELER GREY,
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STATEMENT OF THE CASE

This brief is submitted on behalf of the appellee, Estelle Campbell.

Appellant's statement of the case is controverted as being incomplete and we, therefore, here set out a statement of the case.

This is an action brought by a beneficiary under a certificate of insurance issued by the appellant, a fraternal benefit association, on January 3, 1920. Pursuant to the provisions of 28 USCA, Sections 41

and 71, the action was removed to the United States District Court for the Western District of Washington, Northern Division, on the grounds that it involved over $3,000.00 and that there was a diversity of citizenship. The cause was tried before the court and a jury on January 19, 1940. There was verdict for the plaintiff, and, on the same day, the clerk entered judgment thereon. Formal judgment was signed on January 26, 1940, and filed January 29, 1940. Appellant's motions for judgment notwithstanding the verdict and for a new trial were denied by an order entered March 18, 1940.

On April 16, 1940, notice of appeal was filed with the clerk's office and on April 20, 1940, a supersedeas and cost bond on appeal was filed.

Appellant, an Ohio corporation, is authorized to do business in the State of Washington. Its Supreme Council governs the organization and its many Grand and Local Councils throughout the country. The decedent-insured, Robert H. Campbell, was a member of Seattle Local Council No. 83. The rights, privileges, powers and duties of the three types of councils and of all individual members are governed by a constitution and by-laws printed in pamphlet form and frequently amended. So far as the facts of this case are concerned, they are controlled by the constitution and by-laws, effective September 1, 1919, consisting of a pamphlet of over 100 pages of some forty closely printed lines, and by

the constitution and by-laws effective September 1, 1937, consisting of a pamphlet of 100 pages of some forty closely printed lines. Both of these pamphlets were admitted in evidence (R. 68, 81) and their pertinent portions are printed in the transcript of record (R. 45-51, 60-66).

Through error and accident there was omitted from the record, as printed for the consideration of this Court, a section of the 1937 constitution of the Order material to the appellant's case, and two sections of the 1919 constitution of the Order material to the appellee's case. These sections, as parts of the constitutions, were before the trial court and jury. The parties to this appeal, through their counsel, have prepared and signed a stipulation directing that the omissions be corrected and a supplemental record containing the omitted sections be certified and transmitted by the clerk of the district court to this Court. It is the desire of both parties that the omitted portions of the record be considered on this appeal.

For the convenience of the Court and the parties the omitted sections have been printed in an appendix to this brief.

When the decedent became an insured member on January 3, 1920, $2.00 "calls" were levied by the Supreme Secretary against the individual insured member's account with the local council. No such call could be levied against a new member within

the two calendar months succeeding that in which he was insured. The $2.00 had to be paid to the Supreme Secretary by the local council within 15 days of the call. (R. 46) Within 15 days of the call the Supreme Secretary also levied an assessment on each insured member in good standing, which assessment was paid to the secretary-treasurer of the subordinate or local council within 30 days of the date of levy. No new member could be assessed for any such purpose within the two calendar months succeeding that within which he was insured. (R. 46).

The 1919 constitution also provided that any member, insured or uninsured, failing to pay all dues and assessments charged or levied against him as a member or an insured member when and as they became due and payable, immediately became delinquent, was suspended from all benefits and ceased to be in good standing as a member of the Order. If he later regained his good standing as a member or was reinstated as an insured member his restoration did not entitle him or his beneficiary to indemnity or benefits on account of any accident or injury received by him while not in good standing or on account of death resulting therefrom. (R. 47, Appendix, 1 et seq.)

Under the 1919 constitution any members, insured or uninsured, failing to pay arrearages before the next regular meeting of his subordinate council

(held once every 30 days—R. 51) following his default, was to be suspended from the Order by the senior counselor or the presiding officer of the local council. If such meeting, for any reason, was not held, the secretary-treasurer of the council was ordered to suspend the member from the Order, entering that fact on his books. If such officer failed to suspend the delinquent member, he, the officer, was subject to summary removal from office by the Supreme Counselor. (R. 47, Appendix, 1 et seq.)

Upon suspension from membership the member's certificate of insurance was deemed cancelled, null and void, without the necessity of formal cancellation (R. 48). One witness testified that suspensions for failure to pay dues and assessments when due were made in Columbus, Ohio, at the headquarters of the Supreme Council (R. 69).

Reinstatement of all members suspended from the Order was effected by making application therefor to their local council, on a blank prepared by the supreme executive committee of the Order. The application was to be accompanied by a sum equal to the current dues and one assessment. The secretary-treasurer of the local council presented the application at the next regular meeting of the council. It then had to be referred to a committee of 3 for investigation and the committee's report was subject to a ball ballot. If no more than 2 voted against

reinstatement, the member was reinstated by the senior counselor. (Appendix, 1 et seq.)

The 1919 constitution further provided that, after the automatic cancellation referred to in the preceding paragraph of this statement of facts, the insured member should reapply for insurance on a blank prepared by the Supreme Executive Committee, and should accompany the application with $2.00. The application was forwarded to the Supreme Secretary. The Supreme Executive Committee could require the applicant's examination by his Council Surgeon, the Supreme Surgeon or some competent person selected by the Supreme Surgeon. The report was submitted to the Committee, and if the applicant was found a desirable risk the Committee could insure the member.

It appears from the testimony of the Secretary-Treasurer of the local council, George B. Dunn, that the provisions of the constitution of 1919 were changed at some period unknown to the witness so that the dues and assessments had to be paid at the end of the call and the members did not have thirty days within which to pay them (R. 73). No copy of the constitution making such change was offered in evidence by appellant. Nor did appellant produce any constitution of the Order other than that effective on September 1, 1937, (Defendant's Exhibit B-6; R. 60). The witness' testimony would indicate that the provisions of the 1919 constitution were in

effect for a considerable, though undetermined, length of time.

The 1937 constitution provided that there be an annual assessment of $16.00 charged against all insured members on December 2 of each year. These could be paid annually, semi-annually or quarterly but in any event payments of $4.00 were due and payable on or before December 31, March 31, June 30 and September 30 of each year (R. 65). This constitution also contained the provision that no newly initiated member was to be assessed for any purpose within two calendar months succeeding that within which his certificate of insurance was issued. (R. 62.)

The 1937 constitution differed from that of 1919, in that he who failed to pay his dues or assessment when due occupied a "delinquent" status for 30 days after the default. During that time he could reinstate himself merely by paying the sum due. Yet upon the default all indemnity and benefits were lost to him and his beneficiary and upon his reinstatement within the 30 days such indemnity and benefits were restored but did not operate to cover any accident or injury received by him while in default, or a death resulting from such accident or injury. During the 30 day period he was not suspended nor was his certificate cancelled. (R. 61-62.)

It was further provided that:

"Should any delinquent member fail to re-

> store himself in good standing within thirty (30) days from the date of such delinquency, the Secretary-Treasurer of his Local Council shall immediately suspend him from membership and insurance in the Order. Such Secretary-Treasurer shall at once notify the Supreme Secretary of such suspension and report the same to his Local Council at its next regular meeting.
>
> "Failure to suspend a delinquent member under the provisions of this Section shall not constitute nor be deemed a waiver of the forfeiture provided for in this Section, and the officer so failing to suspend may be summarily removed from office by the Supreme Counselor." (R. 62-63.)

The 1937 constitution also provided that upon suspension the member's certificate of insurance was deemed cancelled, null and void, from and after such suspension without the necessity of formal record of cancellation. (R. 66.)

Under the 1937 constitution the suspended member, being under 60 years of age, as the insured was when he died, desiring reinstatement within 90 days of his suspension, might be reinstated by signing a statement prepared by the Supreme Executive Committee, that his mental and physical condition was not impaired in any way that would render him undesirable for insurance, and by paying such pro rata portion of the annual assessment as the Committee might fix and a sum equal to the dues for the current period. The Secretary-Treasurer of the local council forwarded the statement, together with the amount of one assessment to the Supreme Secre-

tary. If the application was approved by the Supreme Executive Committee, the Supreme Secretary made a record of the reinstatement and forwarded that record to the applicant showing the reinstatement. (R. 64.)

If the applicant failed to apply for reinstatement within 90 days after his suspension, the application was submitted to the Secretary-Treasurer of his local council and presented at the next regular meeting of that council. After investigation by a committee of three members, a ball ballot was taken on the application and if not more than two adverse ballots appeared, the Senior Counselor declared the applicant reinstated to membership, subject to the approval of the Supreme Executive Committee. (R. 63-64.)

The complaint alleges appellant's issuance of a certificate of insurance to Robert Henry Campbell on January 3, 1920; that all dues and assessments were paid or tendered and that the policy was in full force and effect on July 12, 1938, the date of the insured's death by accident within the meaning of the provisions of the contract (R. 1). The questions of the accidental death, appellee's notice thereof to appellant, the latter's failure to furnish proofs of claim, appellee's substitution as beneficiary, and the reduction of the death benefit from $6,300.00 to $5,000.00, were admitted by stipulation at the time of trial (R. 24).

Appellant, admitting the existence of the certificate of insurance, pleaded portions of it and portions of the 1937 constitution and that deceased was in default by reason of the failure to pay Assessment No. 233, which was payable June 30, 1938, thus relying upon the forfeiture provisions of the contract (R. 12).

By amended reply the appellee pleaded appellant's waiver of the forfeiture provisions of the contract and its estoppel to rely upon the forfeiture provisions, and also alleged that assessment No. 233 was paid by reason of certain credits to which the insured was entitled on the books of the appellant. (R. 19.)

Appellee introduced in evidence the certificate of insurance (R. 67), a portion of which is printed in the record (R. 41), the certificate of membership (R. 44-67), the 1919 constitution (R. 68), portions of which are printed in the record (R. 45-51), appellant's account sheets (R. 70), most of which are printed in the record (R. 52, 54), and the so-called "courtesy" delinquent notice and the envelope in which it had been mailed (R. 79), printed in the record (R. 55-56).

Appellant introduced in evidence a notice of quarterly installment No. 239, due December 31, 1939 (R. 81), printed in the record (R. 56), an extract from "The Sample Case" of installment No. 239 (R. 81), printed in the record (R. 57), extracts from

three copies of the "Seattle Tickler" (R. 81), printed in the record (R. 58-59) and the 1937 constitution (R. 81), portions of which are printed in the record (R. 60-66).

By typographical error there is omitted from the printed copy of "Plaintiff's Exhibits '4' and '5' " (R. 52) ditto marks and the numeral "1" to show that dues of $1.00 payable October 1, 1926, were paid May 11, 1926; and the numeral "1" is omitted to show the sum of the dues paid on March 29 and October 13, 1937.

Under "When Called" in the Assessment Account is entered the date when the particular assessment is due.

The account sheets just referred to (R. 52) show that during the life of the certificate of insurance, Robert Henry Campbell, the insured, paid 144 installments of dues and assessments. These exhibits reveal that fifty-one of the installments were paid after they were due and payable. The period of default ranges from eight days for assessment No. 197 to one hundred twenty-eight days for the dues payable July 1, 1929. Some of the other periods of default are ninety-nine days, seventy-two days, three of seventy-one days, eighty-nine days, and two of fifty-five days. Twenty-seven (27) of the installments were paid more than thirty days after they were due.

It is important to remember that the account

sheets (R. 52) show that in each of the fifty-one instances where the insured failed to pay dues and assessments when they were due and payable, the appellant subsequently collected, retained and still retains the dues or assessment thus in default.

The Secretary-Treasurer of the Local Council testified that he had to make a report of payments by members and suspensions of members for non-payment of dues and assessments to the Supreme Secretary by the 15th of each month. Such report would show who had been suspended for failing to pay dues or assessments by the first of that month. Presumably when he collected the defaulted dues and assessments from the insured he included them in this report and sent them back to Columbus. There is no evidence that Columbus headquarters ever returned them to the insured or to the local council.

The evidence is uncontradicted that the insured was never formally "suspended" from membership in the Order by reason of default in the payment of dues or assessments (R. 75). If he had been "suspended" for that reason the record sheets would have been marked "Suspended" (R. 70). They were not so marked (R. 52). There was no evidence that his policy was ever formally cancelled or declared null and void. Nor was he ever required to re-apply for membership or insurance or submit to a further medical examination. Appellant introduced no evi-

dence to show that he was ever required, as a condition of reinstatement, to sign a statement, prepared by the Supreme Executive Committee, that his medical and physical condition was not impaired in any way that would render him undesirable for insurance. It does not appear that he was ever required to submit the question of his reinsurance to the Supreme Executive Committee, to a meeting of his Local Council or to the Secretary-Treasurer of his Local Council. There is no evidence that the appellent company ever did anything but accept each payment made by him whenever it was offered the money. The appellant never refused to accept any payment because the insured was "suspended" or because the certificate of insurance was cancelled, null and void. And, by its failure to tender the sum of the late payments to the insured during his life or to the appellee upon insured's death, it is apparent that appellant still maintains its right to waive any and all forfeiture provisions and yet, insist upon full payment.

ARGUMENT

SUMMARY

It is the established rule in the State of Washington that the by-laws of a fraternal insurance society may be waived by a custom acquiesced in by the society. And the acts, declarations and dealings which go to make up that custom may be those of the society itself or those of its agent.

It is also the rule in this state that the custom may be the result of the acts, declarations and dealings of the collecting officer of the local camp even though the constitution of the order provides that he cannot waive the provisions of the constitution, for, of course, such a proviso may also be waived. On a strict application of theories of agency it is said that the case does not rest upon waiver by the local agent but upon the rule that where the local officer knows of facts which render the policy null and void, his custom of collecting and retaining assessments and dues and in transmitting them to the home office is the act of the home office, for his knowledge is the knowledge of the society.

By the provisions of both the 1919 and the 1937 constitutions the society had established a custom of receiving payments of dues and assessments from the insured from 1 to 128 days after they were due. The society failed to put into effect the penalty provisions contained in those constitutions. The insured was not formally suspended and his policy was never treated as cancelled, null and void. The society continued to demand and accept late payments, which, upon receipt by the local collecting officer, were transmitted to and retained by the home office.

Under the 1919 constitution the insured member was automatically suspended from benefits on the day of default. If he failed to pay the arrearages

by the time of the next meeting of the local council he was suspended from membership by the Senior Counselor of the local council or by its Secretary-Treasurer. This suspension had to take place within 30 days of default, because the meetings were held every 30 days. Suspension from membership amounted to automatic cancellation of the policy. Reinstatement was formal and involved (R. 47-48, 50-51, appendix, 1 *et seq.*) Under the 1937 constitution the delinquency and suspension provisions were included in one section which set out the provisions of forfeiture. The existence of a waiver depends upon the effect the insurer's actions have upon the insured, not upon what the insurer intends. The insurer did waive the suspension provisions and did accept subsequent payments of dues and assessments. The jury had before it the uncontradicted fact that from one-fifth to one-third of all the payments insured made, were made at a time when, had the insurance company put into effect the forfeiture provisions of the contract, the certificate was cancelled, null and void. What would this lead a reasonably prudent man to believe? The notice sent to the home of the insured on July 6, 1938, was also before the jury, and it is further evidence that the company did not put into effect the delinquency or non-coverage provisions of the constitution, for it provided that payment of assessment No. 233 had to be made at once, "*or* you can-

not receive any benefits in case of accident" (R. 55, emphasis supplied). The jury found that a reasonably prudent man would thereby be led to believe that his policy continued in force even during default periods. This is a justifiable inference supported by the evidence, and this has so been held in a case involving this appellant. *Suits v. Order of United Commercial Travelers,* 166 N. W. 222 (Minn. 1918). To reach a different conclusion requires a finding under the 1937 constitution, that the insured realized he was not covered during the 30-day delinquent period but was justified in believing that for periods of default of more than 30 days the company had waived its suspension and non-coverage provisions. This is unreasonable. Furthermore the jury could as well reach the conclusion it did.

Once the custom of permitting the insured to make late payments without putting into effect the forfeiture provisions of the contract is established, there is a presumption that the insured acts in reliance upon it when he fails to pay dues or assessments within the period.

It being established that the custom may amount to a waiver, and that the agent of the Supreme Council may waive the constitutional provisions or that his knowledge and acts are those of the Supreme Council, it was proper for the Secretary-Treasurer of the appellant's Local Council to testify as to what he had or had not done. Appellant's

objection to his so testifying was not well taken since he later testified for the appellant on the same questions without any reservation of objections by appellant's council. Furthermore the objection to Mr. Dunn's testimony was taken at a time when he was testifying as to the content of plaintiff's exhibits Nos. 4 and 5 which had been admitted without objection by appellant (R. 70). And finally the objection taken was too general in its reference to the "provisions of the contract itself" to permit the appellant to raise the question on appeal. The contention of appellant is that the 1937 constitution was "the part of the contract." At the time the objection was taken this constitution had not been offered in evidence.

Once a custom amounting to a waiver or estoppel has been established it can be nullified and a forfeiture declared for the same cause only upon *specific notice* to the insured that the penalty provisions will be insisted upon. The only pertinent evidence of notice being given to this insured was contained in publications which had been sent to him during the same time that the company was pursuing the course of conduct which resulted in the waiver. Such notice, unofficial as it was, sent to every individual member will not be deemed of more force than the actual official provisions of the constitution which the company is waiving at the same time it gives the unofficial notice.

The notice contained in plaintiff's exhibits Nos. 6 and 7 (R. 79) were never received by the insured, and could not be specific notice to him. Furthermore it furnishes additional evidence upon which the jury could find a waiver or estoppel because it asked for payment of assessment No. 233 at once "*or* you cannot receive any benefits in case of accident" (R. 55, emphasis supplied).

The denial of appellant's motion for dismissal and the refusal to direct a verdict for it were proper because of the law governing the facts of this case. Both the law and the facts are to be fully discussed in the main body of this brief.

Appellant's specification of errors, Nos. III, IV, and V (Appellant's Brief, 11-14) cannot be urged on appeal because they were not made until after the jury had retired to consider the verdict, and appellant's counsel did not ask that the jury be recalled and proper instructions given.

The specification that the court erred in giving the portion of the instruction set out in appellant's brief on pages 11 and 12, must be considered as a part of the entire instruction by the court (R. 91-96). That instruction correctly stated the law governing this case.

Appellant's contention that the court erred in refusing to give its requested instruction No. 4 is not well taken (R. 13). Its content, stated in the negative, is contained in the instructions the court did

give. The same objection may be made to appellant's contention that the court erred in failing to give its requested instruction No. 5 (R. 13-14).

POINT ONE

The By-Laws of a Fraternal Benefit Insurance Society Declaring a Forfeiture of Benefits for Non-payment of Dues or Assessments When Due May Be Waived by a Custom Acquiesced in by the Society, and This Is So Whether the Custom Is the Result of the Acts and Representations of the Society Itself or of Its Local Collecting Officer.

THE GENERAL RULE.

Appellant has specified six errors in its brief and has divided its argument into six subheads. Yet, the appellant's case really rests upon two contentions. Firstly, the last assessment was not paid when due; by the terms of the contract between the parties, the insured was delinquent and neither he nor the beneficiary was entitled to benefits under the policy; and, the appellant had not so conducted itself with relation to the insured as to create a waiver of the delinquency provisions of the contract or an estoppel to rely upon such provisions. Secondly, the secretary-treasurer of the local council did nothing which would bind the Supreme Council by waiver or estoppel because no known right was waived and because it was specifically provided in the constitution that he could not waive

any of its provisions.

The determination of the questions raised by these contentions must depend upon the law of the State of Washington since they are questions of substantive law and general jurisprudence.

Erie Railroad Company v. Thompkins, 304 U. S. 64, 78; 82 L. ed. 1188, 1194; 58 S. Ct. 817.

The rule is firmly established in this state that a fraternal benefit society, such as the appellant, may by custom, waive the provisions of its by-laws.

In *Kennedy v. Knights of Maccabees,* 100 Wash. 36, 170 Pac. 371, the local record keeper had for years accepted the dues of members up to the 20th of the month following the month for which they were due and payable. No record of suspension for defaults in a prior month was made until such report was sent in to the supreme tent on or about the 20th, although the constitution provided that suspension was to be made on default. It was also *the custom* of the record keeper, before sending in the report of suspensions, to send a notice to the member that his dues were unpaid, and that, unless they were paid by the 20th, he would be reported as suspended. The plaintiff relied upon waiver of the forfeiture provisions by custom. There was a motion to strike the portions of the complaint showing custom and tending to fortify the showing of custom by the statement of interrelated facts. There was also a demurrer on the ground of the insufficiency of the facts to state his cause of action.

Both the motion and the demurrer were overruled and there was judgment on the verdict for plaintiff. This judgment was affirmed on appeal. In passing on the question of the existence of a rule of waiver by custom the court said:

> "We think the motion and demurrer were both properly overruled. It is the rule in this state that the by-laws of a fraternal insurance society may be waived by a custom acquiesced in by the society. *Richardson v. Brotherhood of Locomotive Firemen & Enginemen,* 70 Wash. 76, 126 Pac. 82, 41 L. R. A. (N. S.) 320; *Frank v. Switchmen's Union of North America,* 87 Wash. 634, 152 Pac. 512; *Morgan v. Northwestern Nat. Life Ins. Co.,* 42 Wash. 10, 84 Pac. 412, 7 Ann. Cas. 382; *Boutin v. National Casualty Co.,* 86 Wash. 372, 150 Pac. 449." 100 Wash. 39, 170 Pac. 372.

The rule is well stated in *Reynolds v. Travelers Insurance Co.,* 176 Wash. 36, 28 P. (2d) 310. That case involved waiver by a local agent after the forfeiture upon which the company could have relied, rather than a waiver by custom as in this case. Nevertheless the court in its opinion stated the rule which applies, as well, to the facts of the instant case. At page 26 of its brief appellant has quoted from the case as authority for its contention that there must be a waiver of a know right. The complete quotation is as follows:

> "A waiver is the voluntary relinquishment of a known right, and may be either express or implied. An express waiver is governed by its own terms, and hence is not often the subject of much dispute. An implied waiver may arise

where one party has pursued such a course of conduct as to evidence an intention to waive a right, or where his conduct is inconsistent with any other intention than to waive it. An estoppel is a preclusion by act or conduct from asserting a right which might otherwise have existed, to the detriment and prejudice of another who, in reliance on such act or conduct, has acted upon it. A waiver is unilateral and arises by the intentional relinquishment of a right, or by a neglect to insist upon it, while an estoppel presupposes some conduct or dealing with another by which the other is induced to act, or to forbear to act. 5 Cooley's Briefs on Insurance (2d Ed.), pp. 3939 to 3945.

"In this case, there is no evidence of any express waiver, although respondent contends to the contrary. This leaves the question, then, whether there was an implied waiver or else an estoppel. Just where the application of the doctrine of implied waiver ends and where that of estoppel begins, is often a very difficult question, and the authorities indicate much confusion upon the subject. It is not necessary to attempt to draw the distinction here, because we are satisfied that, under the facts as shown by the evidence, there were both an implied waiver and an estoppel.

"The rule upon the subject is that, if an insurance company, having knowledge of such facts as vitiate the policy, nevertheless enters into negotiations or transactions by which it recognizes or treats the policy as still in force, *or by its acts, declarations and dealings leads the insured to regard himself as being protected by the policy,* or induces him to incur trouble or expense, such acts, transactions or declarations will operate as a waiver of the forfeiture and estop the insurer from relying thereon as a defense to an action on the policy. 5 Cooley's Briefs on Insurance, p. 4272; 7 Couch Cyc. of Insurance Law, §1595, p. 5595 *et seq.*

"A provision for forfeiture is inserted in an

> insurance policy for the benefit of the insurer, and, like all such provisions, may be waived by the company. Such a provision is binding to the extent that the insured can not ignore it, nor can the courts grant relief against it, but the insurer may waive it, or, by its conduct, lose its right to enforce it. *Thompson v. Knickerbocker Life Ins. Co.,* 104 U. S. 252, 26 L. Ed. 765." 176 Wash. 45-46, 28 P. (2d) 314.

In *Morgan v. Northwestern Nat. Life Ins. Co.,* 42 Wash. 10, 84 Pac. 412, a case cited as authority for the general rule in *Kennedy v. Knights of Maccabees,* 100 Wash. 36, 170 Pac. 371 (Supra 20), all premiums on the policy were payable in advance to the home office or to agents producing signed receipts. Nonpayment of any premium when due forfeited premiums already paid, and terminated the liability of the company. At first payable quarterly, a change required monthly payment of the premiums. The policy could be reinstated, during insured's life, within twelve months of lapse by reason of nonpayment of premium by the payment of all past due premiums and a fine of ten per cent. per annum thereon. During the last year of insured's life monthly payments were accepted from nineteen to thirty-one days after they were due. The premium due on October 1, 1903, was never paid, the insured dying October 13, 1903. The company refused payment under the policy. In affirming judgment for the plaintiff - beneficiary the court approved the following instruction given below:

"Now, if you find from the evidence that she

made all of the payments of these monthly installments of premium toward the latter part of the month, after the making of the new arrangement, and that the company received them without objection and without calling her attention to the fact that they were payable sooner, and if you further find that, by such course of dealing, she, as a prudent person, was led to believe, and did believe, that she was making these payments according to the terms of this new arrangement, by making them at any time during the month, if you find that she so understood the new arrangement, and that the custom and conduct of the company in receiving these payments without objection were calculated to lead an ordinarily prudent person to so understand and believe, and that she was thereby induced to rest in that belief and understanding at all times previous to her death and that, in consequence of such conduct on the part of the company, she had good reason to believe, and did believe, up to that time that she had paid all these installments as they became due, and that the last one was then overdue, if you find all these facts from the evidence in the case—then I instruct you that the company is estopped and has waived its right to insist upon the forfeiture of this policy by reason of the nonpayment of the last installment of premium; and in that case your verdict should be for the plaintiff."

42 Wash. 12, 84 Pac. 412.

Proceeding upon the theory that it would be inequitable to allow the company to receive money under such circumstances and disclaim any responsibility to the insured, the court adopted the following language found in a case before the United States Supreme Court where there was a provision

in the policy that the agents were not authorized to waive forfeitures:

> "The principle that no one shall be permitted to deny that he intended the natural consequence of his acts when he has induced others to rely upon them is as applicable to insurance companies as it is to individuals, and will serve to solve the difficulty mentioned. This principle is one of sound morals, as well as of sound law, and its enforcement tends to uphold good faith and fair dealing. If, therefore, the conduct of the company in its dealings with the assured in this case, and with others similarly situated, has been such as to induce a belief that so much of the contract as provides for a forfeiture if the premium be not paid on the day it is due would not be enforced if payment were made within a reasonable period afterwards, the company ought not, in common justice to be permitted to allege such forfeiture against one who has acted upon the belief, and subsequently made the payment. And, if acts creating such belief were done by the agent and were subsequently approved by the company, either expressly or by receiving and retaining the premiums, the same consequences should follow."
>
> *Insurance Co. v. Wolff,* 95 U. S. 326; 24 L. Ed. 387, quoted in *Morgan v. Northwestern Nat. Life Ins. Co.,* 42 Wash. 10, 14, 84 Pac. 412, 413.

The Washington court also adopted the reasoning of another United States Supreme Court case in the following words:

> "It was held, in *Hartford, Etc. Ins. Co. v. Unsell,* 144 U. S. 439, 12 Sup. Ct. 671, 36 L. ed. 496, that a life insurance company, whose policy provides for the payment of premiums at stated times, and, further, that the holder agrees and accepts the same upon the express

> condition that, if the monthly dues are not paid to said company on the day due, then the certificate shall be null and void and of no effect, may nevertheless, by its whole course of dealing with the assured, and by accepting payments of overdue sums without inquiries as to his health, give him a right to believe that the question of his health would not be considered, and that the company would be willing to take his money shortly after it had become due, and such a course of dealing may amount to a waiver of the conditions of forfeiture.
>
> "To the principles announced in those cases we unhesitatingly give our indorsement; and, there appearing to be no errors in the trial of the cause, the judgment is affirmed."
>
> *Morgan v. Northwestern Nat. Life Ins. Co.,* 42 Wash. 10, 16, 84 Pac. 412, 414.

Cases from other jurisdictions which indicate that the rule of waiver or estoppel by custom is of general application are:

Suits v. Order of United Commercial Travelers of America, 166 N. W. 222 (Minn., 1918).

Reisz, v. Supreme Council American Legion of Honor, 79 N. W. 430 (Wis.).

West v. National Casualty Co., 112 N. E. 115 (Ind. 1916).

Harris v. Sovereign Camp, W. O. W., 23 N. E. (2d) 793 (Ill. App.).

Nelson v. National Guaranty Life Co., 21 P. (2d), 1022 (Cal. 1933); hearing by Supreme Court denied July 7, 1933.

Bruns v. Milk Wagon Drivers' Union, Local 603; 242 S. W. 419.

Edmiston v. The Homesteaders, 144 Pac. 826 (Kan., 1914).

Suits v. Order of United Commercial Travelers, 166 N. W. 222 (Minn. 1918), which applies the general rule of waiver by custom to this appellant's

constitution and by-laws and in particular to the provisions thereof here relied upon by the appellant, will be discussed at a later point in this brief (post 39).

The Wisconsin court applied the general rule heretofore discussed to the facts in *Reisz v. Supreme Council American Legion of Honor,* 79 N. W. 430, and it was held that there had been a waiver. In that case assessments had to be paid on the first and fifteenth of each month. On default the member stood suspended with privilege of reinstatement by payment at any time within 60 days of the delinquent assessment, *together with* all other assessments which had been called before the date of suspension. The insured failed to pay the July first assessment. He died on July tenth. On that day his daughter paid the assessment. The collector endeavored to return it on receiving information of the insured's death but the daughter would not accept it. The records showed payments were frequently made by insured as late as two weeks after the due date and the local secretary testified he was never suspended. *The collector testified he had received single assessments after they were due, although others had also been called, without question of decedent's good standing and was ready to receive the one assessment on July tenth, although those of July fifteenth and July twentieth had been called before July first, and made no sug-*

gestion of insufficiency thereof until informed of the insured's death. In applying the general rule and holding that the forfeiture provisions had been waived the court said:

> "* * * In the light of the above-mentioned evidence from defendant's officers, and the testimony of plaintiffs that throughout a long period such payments had been made and received from a few days to a month late, with no suggestion that anything more was necessary to set decedent right, and protect his interests, the question of the intent and understanding of the parties was open to the jury, and they were justified in holding that such payments were made and received on the understanding that decedent thereby kept his standing, and not that it was necessary to regain it. From that he might reasonably infer that he was in the future to be accorded a reasonable credit upon his assessments before there should be deemed to be a default causing his suspension, and that the strict letter of his contract had been modified or waived to that extent." 79 N. W. 431.

CREATION OFF THE CUSTOM BY THE SOCIETY ITSELF OR BY ITS LOCAL COLLECTING AGENT.

Appellant in its brief has stressed the fact that the constitution of 1937 provided that no officer or agent of a local council is authorized or permitted to waive any of the provisions of the constitution relating to insurance (Appellant's brief 47, 54-57). Therefore, says the appellant, no matter what Dunn or Watson, the local secretary-treasurers, during the life of the policy, did or did not do, their actions could not have the effect of creating a waiver of the

forfeiture provisions in the constitution. This is answered in two ways.

On the theory of ratification and estoppel it is held in this state that where a local collecting officer continues to collect dues and assessments and remits them to the head office, which retains them, after he, the local collecting officer, has knowledge of facts which will forfeit the certificate of insurance, his knowledge is imputed to and becomes the knowledge of the home office.

In *Peterson v. Modern Woodmen of America,* 127 Wash. 412, 220 Pac. 809, it was specifically provided that no local camp or officer could waive provisions of the by-laws and his knowledge should not be construed to be the knowledge of the home office. The intemperate use of intoxicating liquors voided the policy, forfeited the payments made on it, and the retention by the society of assessments or dues paid either before or after the death of any member of his reinstatement, or any assessments or dues paid subsequently thereto, would not constitute a waiver of any of the provisions of the by-laws.

It was shown that members and officers of the local camp, including the clerk, had known that the insured had become so intemperate in his use of intoxicating liquors that his business and domestic life were disrupted for more than two years prior to the time he committed suicide. The local camp took no action and did not report any of the facts

to the head camp or its officers. The local camp, through its clerk, did continue to accept insured's assessments and dues and transmit them to the head camp. There was judgment on findings favoring the insurance company. This judgment was reversed on appeal.

The appellate court stated that the company's principal contention was that the contract had been voided, and, by the terms of the contract and the provisions of §7278 Rem. Comp. Stat. (later set forth herein), the local camp's failure to act on its knowledge of the insured's intemperance and its failure to advise the head camp thereof did not constitute a waiver of the provisions of the by-laws, and that the acceptance of assessments and sums due did not constitute a waiver of the terms and conditions of the contract. In reversing the trial court the appellate court went on to say:

> "Whatever may be the rule in other jurisdictions, cases from which have been freely cited and urged upon us by the respondent, it appears that the cases of *Schuster v. Knights & Ladies of Security,* 60 Wash. 42, 110 Pac. 680, 140 Am. St. 905, and *Shultice v. Modern Woodmen of America,* 67 Wash. 65, 120 Pac. 531, are decisive of this case in favor of the appellant, unless Sec. 7278, Rem. Comp. Stat. (P. C. Sec. 3107), has sufficient effect and application to overcome the rule of those decisions."
>
> 127 Wash. 415, 220 Pac. 810.
>
> "The two cases, and others therein cited, are authority for the rule that a certificate of fraternal insurance which becomes suspended and

therefore absolutely null and void, by the terms of the contract, just as in the present case the excessive use of intoxicating liquors by a member shall cause his certificate to become and be absolutely null and void, by the terms of the contract, may be reinstated in spite of facts that prohibit it under the terms of the contract if those facts are known to the collecting officer of the local camp who collects subsequent assessments and dues that are transmitted to and retained by the home office, upon the theory of ratification by and estoppel against the society, because, under the law of agency the knowledge of the collecting officer of the local camp is the knowledge of the society, *and that, notwithstanding an attempt to provide otherwise in the contract.* It is said of the knowledge of the clerk of the local camp that it will be conclusively held to be the knowledge of the Society without regard to whether he communicated the facts to it."

127 Wash. 419-420, 220 Pac. 811 (emphasis supplied).

The *Peterson* case was decided after the adoption of a statutory provision permitting the society to forbid waiver by its agents. This statute (Sec. 225 of the Insurance Code, Laws of 1911, p. 290, Sec. 7278, Rem. Rev. Stat.) was discussed by the court in these words:

"The statute is as follows:

"The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiaries of members.

"Very clearly it refers to the power or au-

thority of a subordinate body, its officers and members to waive any of the provisions of the laws and constitution of the society. There is no conflict, however, between the statute and our decisions. *It must be kept in mind that the great, outstanding thought of the decisions in question is not one of waiver at the instance of a subordinate lodge or officer, but, on the contrary, the positive assertion that, by force of the dominating law of agency, the knowledge of the particular officer of a subordinate lodge or camp is necessarily the knowledge of the head camp or society and that, being in the possession of that knowledge, if the society thereafter receives and retains assessments and dues transmitted to it after being collected by the subordinate officer or agent, it thereby ratifies the acceptance by its agent of those assessments and dues and is estopped from denying liability.* Or, if the word 'waiver' (so often employed in this class of law for the word 'estoppel') must be used, it is a case wherein the society itself, and not the subordinate camp or officer, because of the society's own knowledge and conduct, through the knowledge and conduct of its agent, will not be permitted to say that it has not waived the provisions of the contract the breach of which by a member would otherwise defeat a right of recovery on behalf of the beneficiary."

Peterson v. Modern Woodmen of America, 127 Wash. 412, 421, 220 Pac. 809, 812.

Secondly, the secretary-treasurer in the instant case testified that a monthly report was mailed by him to the home office at Columbus, Ohio, on the fifteenth of each month and this report of assessments and dues paid and not paid would show who was suspended and who was not (R. 82). There-

fore, with these reports before it the Supreme Council of the Order knew, of its own knowledge, that the insured, Campbell, was customarily permitted to pay dues and assessments long after their due dates, and that he was never suspended and his certificate was never cancelled. It knew that its local collecting officer continued to demand and receive these and subsequent assessments and dues and forward them to it without once putting into effect the forfeiture provisions of the contract. In this view of the case it was not the local collecting officer who performed the acts, omissions and representations which in turn created the custom and waived the provisions of the contract, but the Supreme Council. It is not claimed by appellant that the Supreme Council could not waive the forfeiture provisions if it chose to do so.

On this second point it has been held in similar circumstances that the local agent's knowledge thus became the knowledge of the home office.

West v. National Casualty Co., 112 N. E. 115, 121 (Ind. 1916).

APPLYING THE GENERAL RULE TO THE INSTANT CASE.

It is established that a fraternal benefit society, which knowingly and customarily permits the insured to pay assessments and dues long after forfeiture by default, thus leading the insured to regard himself as protected by the policy in spite of reasonably late payments, waives such forfeiture

and is estopped to rely for defense on insured's failure to make a payment before the customary period has elapsed. The facts of the instant case bring it within this rule.

The uncontradicted testimony was to the effect that of 144 payments of dues and assessments made by the insured during the life of the policy, 51 of them were paid from 8 to 128 days after they were due. Of these, 27 payments were made more than 30 days after they were due. Whether it be determined that the 1919 or the 1937 constitution governs the question of the effect of such payment and whatever date Dunn, the local secretary-treasurer, may have referred to as that of change in the assessment provisions from those of 1919 to those of 1937,the fact remains that on at least 27 different occasions insured was more than 30 days in default and *he should have been suspended from membership and insurance in the order under the provisions of both constitutions. This right to suspend insured and cancel the policy was a plain, known, legal right.* This suspension should have been the act of the senior counselor or the secretary-treasurer of the subordinate council under the 1919 constitution (Appendix, 1 *et seq.*). Under the 1937 constitution it was the function of the secretary-treasurer of the local council (R. 62) and it is to be noted that the failure of the officers to suspend the member rendered them liable to summary removal from

office. It does not appear that they were ever removed from office. Mr. Dunn testified that the suspensions are made in Columbus, Ohio, at supreme headquarters.

Under both constitutions suspension from membership resulted in automatic and immediate cancellation of the certificate of insurance. It became null and void (R. 48, 66). Under both constitutions it was necessary in these 27 instances for the insured to cure his default and suspension by formal applications for reinsurance. The company was not forced to reinsure the applicant. It had the plain, known, legal right to refuse to reinsure him if for no other reason than its own caprice or that of three members of the local or subordinate council (R. 50, 64; Appendix, 1 *et seq.*). And under the 1937 constitution, if the suspended member applied for reinsurance within 90 days of his suspension the appellant had the right to require him to sign a statement prepared by the supreme executive committee to the effect that his mental and physical condition was unimpaired in any way that would render him undesirable for insurance (R. 64).

Again, it is uncontradicted that the insured was never suspended from membership or insurance. His certificate was never cancelled, null and void. He was never forced to apply for reinstatement or reinsurance, according to the provisions of either constitution. He never was required to furnish the

statement of physical and mental condition required by the 1937 constitution and the question of his reinsurance was never submitted to the vote or decision of the supreme council or the local council of which he was a member.

The simple truth of the situation was that having failed to put into effect the forfeiture provisions of its constitutions the home office, through its local collecting agent, continued to demand, receive and retain not only the defaulted payments beginning with that due on January 1, 1921, paid February 1, 1921, but 26 additional payments which were more than 30 days overdue when paid and 117 other payments of which some 24 were in default for periods of less than 30 days when they were paid (R. 52).

The cases which have been heretofore discussed (*supra* 20-33) clearly establish that the acts and dealings of the appellant, in permitting the insured to pay dues and assessments long after they were due without putting into effect the forfeiture provisions of the contract and in continuing to demand, accept and retain each and every instalment of dues and assessments for 18½ years has led the insured as a reasonably prudent man to regard himself as protected by the policy. It has led him into a belief that he might pay the instalment within a reasonable time and still be covered by the policy. Thus has the appellant waived its known, legal,

rights under the forfeiture provisions upon which it is now estopped to rely.

But it is contended by the appellant that there is no evidence that by failing to suspend the member on the thirtieth day after default the society intended to waive the provision that the member was not covered during the preceding 30 days.

In answer to this it may be said that the intent of the insurer is not the test of what is or is not waived. The test is what the insured, as a reasonably prudent man, is led to believe as a result of the acts, declarations or dealings of the company.

> "In *Trotter v. Grand Lodge of Iowa Legion of Honor,* 132 Iowa 513, 109 N. W. 1099, 7 L. R. A. (N. S.) 569, the rule is stated that the question whether waiver will be found in any particular case depends not upon the intention of the insurer against whom it is asserted, but upon the effect which its conduct or course of business has had upon the beneficiary."
>
> *Kennedy v. Knights of Maccabees,* 100 Wash. 36, 40, 170 Pac. 371.

Disregarding this clear explanation of the rule, the appellant maintains that in spite of what it did or did not intend to waive, it never waived the provision of non-coverage during the first thirty days after default. In other words, the appellant says, the insured was never covered during this thirty day period, regardless of what had been waived by it after the thirty day period was ended. It seeks to separate "delinquency" and non-coverage during

that time from "suspension" and non-coverage after the thirty days have elapsed. There are two answers to this.

Firstly, both the 1919 and the 1937 constitutions contain penalty provisions embraced within the same articles, and in the latter case, the same section. The more serious consequences follow suspension, the less serious are the result of delinquency. On at least twenty-seven occasions the appellant failed to put into effect the suspension forfeiture provisions, did not require reinstatement, and continued to demand, accept and retain subsequent assessments and dues. On twenty-four other occasions the insured made payments after they were due. Can it be said that the insured, as a reasonable man, was bound to know that the insurer was waiving all forfeiture provisions *except* the one providing for non-coverage during the thirty days following default? As a reasonable man, was he not justified in believing that the appellant would accept his payments, if made within the customary period without relying on any of the forfeiture provisions? The jury found that he was justified in reaching the second conclusion. And when the jury reached this decision it had before it the question of whether or not it believed the statements of appellants' witnesses as to what it *intended* to waive and what it would have done had circumstances sooner presented the question. There

was no evidence that it had established a custom of waiving all but one of its forfeiture provisions.

Secondly, it has been held that *this appellant's* customary acceptance and retention of these late payments was directed to keeping the insured in good standing during the entire life of the policy of insurance. Never having been suspended or reinstated, the constitutional provisions limiting his benefits to periods after his reinstatement would not apply to him.

In *Suits v. Order of United Commercial Travelers,* 166 N. W. 222 (Minn. 1918), *the appellant here was the defendant,* and it relied upon the same clause it relies upon here (R. 47). In that case the insured became a member of the Order on May 28, 1900 and died by accidental means on March 28, 1915. The dues and assessments payable February 24, 1915, had not been paid. As in the instant case the Order of United Commercial Travelers pleaded the default and the constitutional provision barring benefits to the delinquent member until he regained his good standing in the Order. In answer to this the plaintiff alleged a waiver of the forfeiture and delinquency provisions by a practice and custom of accepting and retaining payments from members, including the decedent, at irregular periods after their due date and not insisting upon the forfeiture and reinstatement provisions of the contract, thus leading the insured to believe that he could make

payments within a reasonable time after they were due and still be protected by the policy. The trial court found that the defendant had waived the default and judgment was entered for the plaintiff. The defendant appealed from an order denying its motion for an amendment of the trial court's findings, or for a new trial. The order was affirmed. The court said:

> "2. The constitution and laws of the association contain various provisions upon the subject of dues and assessments and the payment thereof, declaring the effect of a failure to pay within the time fixed therefor, all of which are here of no special importance except section 3 of article 7, which treats of the delinquency of insured members, as distinguished, as we understand the matter, from those who are members without insurance. The section provides that if any insured member fails to pay any or all of the dues and assessments levied against him when and as the same become due, he shall immediately on the happening of such default become delinquent and cease to be in good standing as such insured member, and he and every person claiming by, through or under his certificate of insurance 'shall be suspended from any and all rights to indemnity or benefits.' The section further provides:
>
> > " 'Should such delinquent member at any time regain his good standing as an insured member in the order, his restoration thereto shall in no wise operate to entitle him or any one claiming under him * * * to indemnity or benefits on account of any accident or injury received by him while not in good standing.'
>
> "It is contended by defendant that by these provisions of the laws of the order the failure to pay assessments when due operates automatically to suspend the member in default,

and that the only effect to be given the act of paying delinquent dues, and the act of the association in accepting them, is to restore the member to good standing, subject to the limitation that restoration to good standing shall not entitle a member or those claiming under his certificate to indemnity for injuries received during the period of suspension. And upon this ground defendant seeks to distinguish the case from *Mueller v. Grand Grove,* 69 Minn. 236, 72 N. W. 48, and other like cases. We are unable to concur in that view of the case. While the automatic suspension cannot be questioned — the association laws are specific in that respect — it is clear that the provisions limiting the rights of suspended members on restoration to good standing are inapplicable to the facts here presented.

"The right of voluntary restoration by the payment of delinquent dues is not given, and the provisions of the constitution upon which defendant relies, properly construed, can have application only to such members as have been restored to membership and to good standing in the manner expressly provided for and permitted by the laws of the order. So far as we are informed by the record there is but one method of such restoration, either provided for or recognized by the association, and that is by petition to and favorable action by the local council of which the petitioner is a member. A restoration to good standing effected in that manner is subject to the reservation of nonliability for injuries received by the insured during the period of suspension. But the record before us furnishes no suggestion that decedent had ever been suspended, or that he ever applied for restoration to good standing in the order. He was at no time treated by the association as under suspension, and his delinquent dues were accepted without intimation on its part that he was either in default or not in good standing. In this situation of the case the con-

tention of defendant cannot be sustained. It is probable that in a given case the payment of delinquent dues and the acceptance thereof by the association might be treated as an application for reinstatement in the order, notwithstanding the existence of an otherwise expressly prescribed method of restoration. But such effect cannot be given the payment and acceptance shown in this case. It does not appear that the association ever permitted restoration to good standing other than in the manner expressly provided by its laws. In this respect the case comes within the rule applied in *Leland v. Modern Samaritans,* 111 Minn. 207, 126 N. W. 728, and *Villmont v. Grand Grove,* 111 Minn. 201, 126 N. W. 730, where on similar facts it was held that the question whether the payment of delinquent dues and assessments was for the purpose of gaining restoration to good standing in the order, or for the purpose of maintaining an existing good standing was one of fact. In those cases it appeared that the by-laws there before us gave to suspended members the right to reinstate themselves by voluntarily paying all delinquent dues. No such right appears in this case. *The payments by decedent therefore are to be attributed to a purpose of maintaining a recognized existing good standing, rather than for the purpose of regaining lost rights. Reisz v. Supreme Council,* 103 Wis. 427, 79 N. W. 430." 166 N. W. 233-224.

To the same effect is the decision in *Brotherhood of Maintenance of Way Employees v. Nolan,* 14 P. (2d) 179 (Colo. 1932). In that case, Butler, J., in dissenting, stated that he did so only because the amount of membership dues was the same and had to be paid regardless of whether or not the member

would be entitled to insurance benefits. There were no additional assessments for insurance. He said:

> "* * * If members were required to pay a certain amount as membership dues, and a certain other amount as insurance premium, or insurance dues, an acceptance after the due date of that part paid as insurance premium, or insurance dues, would waive the delinquency and estop the Brotherhood from asserting a forfeiture of the death benefit based upon such delinquency; but, as we have seen, such is not the present case."
>
> 14 P. (2d) 181.

In the instant case insured members paid assessments for their insurance which were separate from their dues which they owed as members. This is conceded by the appellant (Appellant's brief, 3).

Applying the rule of *Suits v. Order of United Commercial Traveler,* 166 N. W. 222 (*supra* 39) and *Brotherhood of Maintenance of Way Employees v. Nolan,* 14 P. (2d) 179 (*supra* 42) to the facts in the instant case, the appellant has on many occasions failed to suspend the insured. In each case it has restored or reinstated him to good standing without requiring that he comply with its formal reinstatement provisions. It has continued to demand, accept and retain each and every installment of dues and assessments without regard to when they were due. It has led him to believe that he might continue to make payments within a reasonable time after they were due and not be subjected to the forfeiture provisions of the contract. He has

continued to do so over a period of eighteen years, believing himself protected by the certificate of insurance at all times. The appellant has thereby waived the failure to pay assessments and dues within the time fixed by the constitution and by-laws and has waived the provisions of the constitution and the contract declaring a forfeiture for the default and is estopped to invoke such forfeiture in an action on the contract.

Never having declared the insured suspended, and the automatic results of default being waived by the appellant, the provisions of the contract, limiting the appellant's liability to injuries occurring after the insured had been restored or reinstated to good standing, have no application to the appellee's claim on the contract. *The payments made by the insured, whether before or after they were due, are to be attributed to a purpose of maintaining a recognized existing good standing in the Order,* rather than for the purpose of regaining lost rights.

It is contended by appellant that the 1937 constitution provides that failure to suspend the delinquent member at the end of the thirty days following default shall not be considered a waiver of the forfeiture provided for. This provision relates to the fact that upon the supreme council discovering that a delinquent member subject to suspension has not been suspended, the supreme council may then

suspend him for the past delinquency. It has no application where the failure to suspend is coupled with a long-continued custom of permitting the insured to pay more than thirty days after the due date. And it is not applicable where the society has demanded, received and retained each and every payment under the policy over a period of eighteen years without regard to when they were paid. And, of course, it, too, may be waived.

Suits v. Order of United Commercial Travelers, 166 N. W. 222 (Minn. 1918), (*supra* 39.).

As the basis for its finding of waiver the jury had before it the many late payments made by the insured, the custom of the local secretary-treasurer to postpone suspension of all members for at least fifteen days after they should have been suspended, the appellant's knowledge of all facts from the reports filed by the secretary-treasurer, the appellant's failure to exercise its known legal right and suspend the insured on twenty-seven occasions when he should have been suspended, the appellant's failure to rely upon its known legal right and insist upon proper application for reinstatement by the insured and his suitability for reinsurance, the appellant's long-continued demand for and acceptance and retention of each and every installment of assessments and dues without regard to when they were due and without regard to previous defaults and cancellations of the policy, and the "courtesy

notice" sent out by appellant's local secretary-treasurer (R. 55) which stated that assessment No. 233 must be paid at once *or* the insured could receive no benefits in case of accident.

Appellant contends that there is no evidence that the insured or the insurer ever treated the policy as in effect during a delinquency period (Appellant's brief, 44). In addition to the evidence referred to in the preceding paragraph, which brings this case clearly within the applicable rules governing the waiver of such forfeiture provisions by the insurer's customary acts, declarations and dealings, and furnishes ample support for the jury's findings, the jury was entitled to presume that the payments made by the insured were for the purpose of maintaining his recognized and existing good standing in the Order. And if that was not the purpose of the Order in accepting such payments, why did it continue to demand payment on a policy it now claims was void by constitutional provisions it had never waived?

Suits v. Order of United Commercial Travelers, 166 N. W. 222, 224 (Minn. 1918), (*supra* 39).
Reisz v. Supreme Council American Legion of Honor, 79 N. W. 430, 431 (Wis.), see quotation (*supra* 28).

In *Edmiston v. The Homesteaders,* 144 Pac. 826 (Kan. 1914), the provisions of the insurer's by-laws were similar to those of the appellant's constitution. Failure to pay an assessment when due sus-

pended the member from benefits without notice and he remained suspended until reinstated. If he remained suspended for three months he could qualify for reinstatement by filing a certificate of good health and paying arrearages. Insured failed to pay the final assessment before the last day of the month in which it was due. On a question of waiver the court found that it was the custom of the local collecting officer to leave the receipts with a local bank who delivered them to members on receipt of the assessments. To the local collecting officer's knowledge the bank customarily accepted payments as late as seven days after the month in which they were due. The court held that the fact that on two occasions the insured had made payment at the bank after the last day of the month in which the payment was due, was sufficient proof to show that she had knowledge of the custom and that she relied upon it.

As was said in *Head Camp, Pacific Jurisdiction, Woodmen of the World v. Bohanna,* 151 Pac. 428, 430 (Colo. 1915):

> "When by the uncontradicted and undisputed testimony plaintiff established that it was the custom of the society to receive assessments from her husband after due, that raised a presumption that it was because of his reliance upon such custom that he failed to pay promptly the assessment in question. She thus carried the burden of showing such reliance."
>
> 151 Pac. 430.

Appellant urges that because insured was killed on the twelfth day after default, only the non-coverage provisions with respect to delinquency are applicable and that whether or not the forfeiture provisions governing defaults of more than thirty days were waived is immaterial to this case (Appellant's brief, 47). However, once a waiver by the custom of accepting late payments is established the member may rely thereon and make payment at any time within the customary period without affecting his good standing or incurring forfeiture. So long as he dies within that customary period, the fact that he has failed to pay the last assessment cannot be urged. This rule is stated and adhered to in the following cases:

Suits v. Order of United Commercial Travelers, 166 N. W. 222 (Minn. 1918).
Edmiston v. The Homesteaders, 144 Pac. 826, 828, (Kan. 1914).
Head Camp, Pacific Jurisdiction, Woodmen of the World v. Bohanna, 151 Pac. 428, 430, (Colo. 1915).
Morgan v. Northwestern Nat. Life Ins. Co., 42 Wash. 10, 12, 84 Pac. 412, 413.
Trotter v. Grand Lodge of Iowa, Legion of Honor, 132 Iowa 513, 109 N. W. 1099, 7 L. R. A. (N. S.) 569, 11 Ann. Cas. 533.

The application is well illustrated in *Edmiston v. The Homesteaders,* 144 Pac. 826 (Kan. 1914), where the court said, at page 828 of its opinion:

> "It is urged, however, that no reinstatement could be made of Jennie Edmiston after her death, but as we view the question, her death occurring prior to the time at which the custom

> permitted payment of the assessment, would make no difference. If she had died on the 29th day of October, with the right to make a payment at any time before the 31st, she would have been a member in good standing, and so if an established custom of the defendant permitted her to pay her assessment as late as the 7th day of the following month, and she had the right to rely on that custom, and to pay at any time before the 7th without a certificate of health, then her death before that day would leave the situation precisely the same as though she had died on the 29th day of the month." 144 Pac. 828.

For various reasons the authorities cited by appellant in its brief are inapplicable to the facts of the instant case.

The appellant has cited several cases defining a waiver to be the voluntary relinquishment of a known right. So far as those cases establish this definition they are correct. Appellant's mistake lies in its contention that it relinquished no known right in the case. As has been said (supra 36) in this case the facts involved bring it well within the accepted definition of waiver.

Appellant has quoted at length from *Bunge v. Brotherhood of Maintenance of Way Employees,* 178 Wash. 33, 33 P. (2d) 383, (Appellant's brief, 29-34). The facts in that case clearly distinguish it from the instant one. In that case the by-laws provided that any member who had failed to pay his dues within the month when they fell due, could reinstate himself within six months by paying the

delinquent dues. It was not until the end of the six months' period without his reinstatement in this manner that he was dropped from the rolls and required to do more than pay his arrearages to be reinstated. *Bunge never failed to pay the delinquent dues during the six months' period.* He never could have been dropped from the rolls. The Brotherhood was always required to accept his dues and reinstate him because the six months' period had not elapsed. No custom of waiver had been built up and thus when he failed to pay his July assessment until August 17, 1931, he was subject to the forfeiture provisions of the contract in question.

The following cases, cited by appellant, may also be distinguished from the instant case because, here, on twenty-seven occasions, the appellant was not required to accept payment of arrearages alone and reinstate the insured:

Richardson v. American National Insurance Co., 137 So. 370 (La. 1931), Appellant's brief, 22.

Stehlik v. Milwaukee Typographical Union No. 23, 171 N. W. 753, (Wis. 1919), Appellant's brief, 40; (where reinstatements by payment alone had, with two exceptions insufficient to form a custom, been made within the four months' period when the company was forced to accept them).

Hope v. Travelers Protective Association of America, 126 S. E. 45, (S. C. 1925), Appellant's brief, 44. (There was no custom here.)

Phillips v. Fraternal Reserve Association, 176 N. W. 851, Appellant's brief, 42.

Wiser v. Central Business Men's Assoc., 219 S. W. 102 (Mo. 1920); Appellant's brief, 37, 46; (where a letter from the home office indicated that the last assessment might be paid late without penalty, and thus raised a question of waiver, but not by custom.)

Rice v. Grand Lodge of A.O.U.W. of Iowa, 72 N. W. 770 (Iowa 1897), Appellant's brief, 38.

In several cases cited by appellant the constitutions provided that payment of arrearages within the period when they were always paid by the individual insured was sufficient for reinstatement, *provided* the insured was in good health at the time of the payment and, in some cases, remained in good health for a definite period thereafter. In these cases the insured either was not in good health at the time of payment or became sick, was injured or died before the subsequent period elapsed. There was an additional provision in these contracts that retention of the arrearages would not amount to reinstatement until the national secretary or financial officer had "actual, not constructive or imputed" notice that the insured was other than in good health at the time of payment. The practice of reinstating members by accepting arrearages would not waive the requirement that they be in good health. These facts and these constitutional provisions clearly distinguish the following cases, cited by appellant, from the instant one:

White v. Sovereign Camp, W. O. W., 192 S. E. 161, (S. C. 1937), Appellant's brief, 39.

Balogh v. Supreme Forest, Woodmen's Circle,

280 N. W. 83, (Mich. 1938), Appellant's brief, 39.

Sovereign Camp, W. O. W. v. Hart, 200 S. E. 296 (Ga. 1938), Appellant's brief, 42.

Taylor v. Latin-American Life and Cas. Ins. Co., 94 So. 375 (La. 1922), Appellant's brief, 45.

The State of South Carolina apparently follows a different rule than that expressed in *Peterson v. Modern Woodmen of America,* 127 Wash. 412, 220 Pac. 809, (supra 29) and other Washington cases. In South Carolina a statute prevents the local agent waiving provisions of the by-laws. His knowledge or waiver is not imputed to the home office. For that reason the following cases are inapplicable to the instant case:

Order of United Commercial Travelers of America v. Belue, 263 Fed. 502 (C.C.A.-4), Appellant's brief, 25, 48, where it is also pointed out that fraud was an element in that case.

Sternheimer v. Order of United Commercial Travelers of America, 93 S. E. 8 (S. C. 1917), Appellant' brief, 51. There was no evidence the Supreme Council had acknowledge of customary acceptance of late payments, and, because of the statute, none could be imputed.

To the same effect and contrary to the Washington law are:

Northern Assurance Co. v. Grand View Bldg. Assn., 182 U. S. 308, 22 S. Ct. 123, 46 L. ed. 313 (Appellant's brief, 55), and,

Modern Woodmen of America v. Tevis, 117 Fed. 369, (Appellant's brief, 55).

In several of the cases cited by appellant the lodge was required to *and had always in the past formally reinstated insured.* Therefore, no custom of waiving

the reinstatement or forfeiture provisions could arise.

Elder v. Grand Lodge A.O.U.W. of Minnesota, 82 N. W. 987, (Minn. 1900) Appellant's brief, 34.

Jenkins v. Ancient Order of United Workmen of Kansas, 144 Pac. 223 (Kan. 1914), Appellant's brief, 35.

Phillips v. Fraternal Reserve Association, 176 N. W. 851, (Appellant's brief, 42); where in addition, insured was an able lawyer with a wide experience in insurance matters who must have understood and appreciated the legal consequence of his acts.

APPELLANT'S LOCAL AGENT WAS A PROPER WITNESS.

On page 9 of its brief appellant refers to the fact that George B. Dunn, its local secretary-treasurer, was permitted to testify on the subject of when the insured paid certain dues and assessments. Since the pleadings raised the question of waiver by custom, the course of dealing between the parties was properly in issue. Dunn knew what those dealings were. His testimony was not only properly admitted but was highly important to the correct determination of the issues. The objection itself was too general to permit the court to rule in appellant's favor.

Furthermore, at the time counsel for appellant objected to Mr. Dunn's testimony the witness was testifying from the Order's account sheets which were conceded to be genuine and which had been

previously admitted in evidence without objection (R. 70). No subsequent objection to Mr. Dunn's testimony was made and, he was later called to testify as appellant's witness and testified as to the course of dealings between the parties, without limiting himself to what appeared on the appellant's account sheets (R. 80-84). It was appellant's contention that the "contract" upon which the objection was based included as its keystone, the 1937 constitution. At the time of the objection the 1937 constitution had not been admitted in evidence and was not before the court.

EXCEPTIONS TO INSTRUCTIONS GIVEN AND FAILURE TO INSTRUCT.

Appellant's specifications of errors, numbered III, IV, and V, relate to the giving of the court's instructions and the court's failure to give appellant's requested instructions numbered 4 and 5. While the underlying principles which occasioned the specification have been previously discussed (supra 19-49), the specifications themselves cannot be considered because the exceptions based thereon were not taken until the jury had retired to consider its verdict (R. 96) and counsel did not ask the court to recall the jury and correct its alleged errors by re-instructing it.

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to

which he objects and the grounds of his objection."
Federal Rules of Civil Procedure, Rule 51.

Appellee does not rely alone upon the failure to seasonably except to the instructions given and the failure to give the requested instructions. What has previously been said (supra 19-49) illustrates that the question of waiver or estoppel by a customary course of dealing was properly before the jury. There was ample evidence to warrant the jury in finding that such a waiver existed and that appellant was estopped to rely upon insured's failure to pay assessment No. 233 on June 30, 1938, (supra 33-49). In this state of the case, the court properly submitted the question to the jury on the instructions given. The portion of those instructions quoted in appellant's brief, at page 11, should be considered with reference to the court's entire instructions (R. 91-96).

Appellant's requested instructions numbered 4 and 5 (R. 99) were fully covered in the instructions which the court did give (R. 91-96). Considered alone each of them relates to a specific contention of appellant and, if given alone, without reference to the facts disclosed by the evidence, would have done little but confuse the jury as to the issue properly before it.

POINT TWO

Where There Has Been a Waiver by Custom of the Penalty Provisions of a Fraternal Benefit Contract for Non-Payment or Late Payment of Assessments and Dues, a Forfeiture Cannot Be Declared for the Same Cause Without Specific Notice to the Insured That the Penalty Provisions Will Be Insisted Upon.

In view of its contention that no waiver or estoppel existed, appellant did not seriously contend that it had nullified such waiver by specifically demanding of the decedent that he pay assessment No. 233 when due or suffer "suspension" and forfeiture. The burden of establishing such nullification was upon the appellant. On the trial it requested no instruction based upon a contention that it had given notice sufficient to accomplish such purpose, and it has not specified error for the court's failure to so instruct.

The evidence was that a regular notice of payment due was contained in the publications of the order and sent to all members. It was allegedly sent to the decedent (although of this no proof was offered) even while the course of custom and habit which lead to the waiver was being developed and followed. Further, appellant's head office, thirty days before payment was due, purportedly sent a regular notice of payment due to all members. This,

too, was a long standing custom. So far as these so-called notices are concerned, they were not a specific demand on this insured which would serve to notify *him* that the company was nullifying its custom and habit and would insist upon its forfeiture provisions as to assessment No. 233. In every previous case where the same notices had been sent the appellant had continued to waive its forfeiture provisions as it had in the past.

Appellant's exhibits B-1 and B-2 are immaterial because the insured in this case was never obligated to pay installment No. 239 (R. 56-57). As to its exhibits B-3 and B-4, this insured had paid assessment No. 232 (R. 58). And, as to appellant's exhibit B-5, it is worded in such a confusing fashion as to be specific notice to no one of any assessment (R. 59).

Appellee introduced in evidence a so-called "courtesy notice" which directed insured's attention to the fact that assessment No. 233 was unpaid and requested him to pay it "*or* he would not be entitled to benefits in case of accident" (R. 55.). This was evidence that the custom of accepting late payments without penalties still was in force. As a "courtesy" this was mailed to all delinquent members by the local secretary within a few days of delinquency. This, too, was a custom of long standing. This particular notice was placed in a sealed envelope addressed to insured's home in Seattle, and post-

marked July 6, 1938. The uncontradicted evidence is that the insured left Seattle on July 3rd or 4th and went to Oregon on a fishing trip. He was accidentally killed on that trip on July 12th. His widow, appellee, returned to their home in Seattle one week later. On or about July 20th, her sister, who was visiting her, brought to her *the unopened envelope* containing the "courtesy notice." Appellee opened the envelope, learned of the delinquency, and later, through a friend, who testified at the trial, tendered payment of the assessment, but it was refused (R. 79). *Campbell, the insured, never received the courtesy notice* (R. 79).

Such courtesy notice is insufficient to nullify the effect of the established waiver. It was appellant's duty, its conduct having occasioned the waiver, to give specific notice and demand to insured before insisting upon the forfeiture provisions it had previously waived. This duty it never performed.

Douglas v. Hanbury, 56 Wash. 63, 104 Pac. 1110, is authority for the rule that such definite and specific notice of an intention to insist on the forfeiture provisions must be given. The court quotes with approval from *Watson v. White,* 152 Ill. 364, 38 N. E. 902, as follows:

> "He knew that all along, from the beginning, the clause declaring time to be of the essence of the contract, and other like clauses, had, by tacit agreement, remained in abeyance, and that all claims under them had been continu-

> ously waived. It may be that the rights of Fix under said clauses of the contract were not absolutely and permanently waived, but from the standpoint of a court of equity they were at least temporarily suspended, and capable of being reinstated only by giving a definite and specific notice of an intention to act under them. Good faith and square dealing required that much."
>
> 56 Wash. 65, 104 Pac. 1111.

Placing in the mails a much more definite and specific notice than the one in this case is not giving such notice to the insured. Here, not only does it fail to appear that such notice was given, but it affirmatively appears that no notice was ever given insured.

Had appellant ever intended to nullify its custom and had it intended to do so by any of the notices introduced in evidence in this case it would have been a simple thing for it to show that the custom was nullified in all other instances and that all its other members knew of and acted in accordance with the nullification as a result of these notices. But not one bit of evidence to this effect was offered.

POINT THREE

WHERE A CREDIT EXISTS ON THE BOOKS OF A FRATERNAL BENEFIT ASSOCIATION IN FAVOR OF AN INSURED MEMBER IT MUST BE APPLIED TO THAT INSURED'S DELINQUENT DUES AND ASSESSMENTS, SO FAR AS IT WILL GO, AND HE CANNOT BE SUSPENDED FOR DEFAULT IN PAYMENT UNTIL THE CREDIT IS EXHAUSTED.

An additional theory upon which appellee asked

for relief in the district court was that assessment No. 233, due on June 30, 1938, had been paid by the insured prior to his death by reason of a credit in his favor appearing on appellant's books. Appellee's exhibit No. 4 (R. 54), an account sheet of the Order, indicated on one side that $10.00 had been collected from the insured on December 20, 1919, and this further entry appeared:

"Credit as follow	Am't
Assessment No. 153	2. "

On the other side of the same exhibit it appears that assessment No. 154, which was due January 1, 1920, was paid by the insured December 20, 1919, and that assessment No. 155, which was due April 15, 1920, was paid by the insured on April 5, 1920 (R. 52). The insurance became effective January 3, 1920 (R. 41-42).

The 1919 constitution provided that assessments were to be called and levied by the Supreme Secretary at least 45 days before the date upon which they were finally due (R. 46). No assessment for any purpose could be levied against a newly initiated member within the two calendar months succeeding that within which he was insured (R. 45-46).

It was appelle's contention that the following credits existed in favor of the insured's account:

1. $2.00 because assessment No. 153 was assessed and collected before Mr. Campbell was insured;

2. $2.00 because assessment No. 154 was assessed and collected before the end of the second calendar month following that in which Mr. Campbell was insured; and,
3. $2.00 because assessment No. 155, which was due April 15, 1920, had been called and levied against Mr. Campbell before the end of the second month following that in which he was insured.

This would establish a credit of $6.00 in the insured's favor.

A member of a fraternal benefit association is not "insured" until the corporation is bound to pay benefits for injuries to the member within the meaning of the certificate. Here, that date was January 3, 1920.

Logsdon v. Supreme Lodge of the Fraternal Union of America, 34 Wash. 666, 76 Pac. 292.

Appellant, being possessed of a sum deposited with it by the insured to pay assessments and dues, was bound to pay assessment No. 233 with that sum and could not insist upon the penalty provisions of the contract arising from non-payment of that assessment.

Logsdon v. Supreme Lodge of the Fraternal Union of America, 34 Wash. 666, 76 Pac. 292.
Supreme Lodge of Patriarchs of America v. Welsch, 60 Kan. 858, apprx., 57 Pac. 115.
Fraternal Aid Ass'n. v. Powers, 67 Kan. 420, 73 Pac. 65.
Knight v. Supreme Council, Order of Chosen

Friends, 2 Silv. Sup. Ct. 453, 6 N. Y. Supp. 427.
Evarts v. United States Mut. Acci. Assoc., 40 N. Y. S. R. 878, 16 N. Y. Supp. 27.

In withdrawing the question of credits from the jury the court directed its attention to whether $2.00 had actually been collected from insured for assessment 153 or 154 (R. 88-89). The court based its withdrawal of the question on the testimony of J. W. Watson, the former secretary-treasurer of the local council, (R. 85) and concluded that the witness had satisfactorily explained that the entry opposite assessment 153 (R. 54) was mistakenly made before he knew that insured's certificate would not be effective until assessment No. 154 was called. The court refused to submit to the jury the conflict of evidence between the exhibit and the witness and the question of whether the witness was telling the truth.

Over objection of appellee's counsel, the court ignored the question of the credits arising from the fact that assessment 154 had been called, levied and collected and assessment 155 had been called and levied prior to two calendar months following January, 1920, the month in which insured was initiated. Therefore, appellee urges upon this Court, as a further reason why judgment in her favor should be affirmed, the fact that the existence of a credit of $6.00, $4.00 or $2.00, any of which would have prevented forfeiture, was not properly left to the determination of the jury. At the very least, the court

should have passed upon the question of the credit raised by the appellee's second and third contentions (supra 61).

The fact that assessment No. 233 was for $4.00 plus dues of $1.00, and the credit might only be for $2.00 is unimportant, since partial payment of an assessment by application of a credit in possession of appellant results in a proportionate coverage under the certificate.

Russell v. Wash. Fire Relief Assoc., 134 Wash. 309, 235 Pac. 954.

CONCLUSION

Construing all the evidence adduced at the trial in the light of the established rules of law in this state, the court properly submitted to the jury the question of whether the appellant had, by a custom or course of dealing, lead the insured, as a reasonably prudent man, to believe that he could safely continue to make payments on his certificate of insurance within a reasonable time after they were due and still remain in good standing and protected by the certificate. The accompanying question of whether the insured had relied on such custom in failing to pay assessment No. 233 on June 30, 1938, was also properly submitted to the jury.

Considering all the evidence in the case and the applicable rules of law the district court could not have said, as a matter of law, that there was no evidence upon which the jury could base a finding that

appellant had waived the penalty provisions of its contract and was estopped to rely upon insured's failure to pay assessment No. 233, due June 30, 1938, prior to his death on July 12, 1938.

The district court's instructions to the jury correctly presented the law and facts to the jury. There was no error in the court's failure to give appellant's requested instructions in the language in which they were drawn.

Upon the ground and for the reasons urged in this brief, it is now submitted that the judgment of the court below should be affirmed.

Dated at Seattle, Washington
August 24, 1940.

Respectfully submitted,
JONES & BRONSON
WHEELER GREY,
Attorneys for appellee, Estelle Campbell.

APPENDIX

APPENDIX

PLAINTIFF'S EXHIBIT "3", Adm. Jan. 17, 1940, Supplemental Extracts from the Constitution and By-Laws of the defendant corporation, effective September 1, 1919.

Art. IV, Sec. 7; p. 56:

"SUSPENSIONS

"Sec. 7. Any member who fails to pay the fees, fines, costs, dues or any assessment charged or levied against him, when and as same become due and payable, shall immediately on the happening of such default and by virtue thereof become a delinquent member, and he and every person or persons claiming under him and by virtue of his membership and his certificate of insurance shall likewise, at the time such default occurs and by virtue thereof, forfeit all right to indemnity and benefits of whatsoever character; while he thus continues a delinquent member the sending to him of notice of any assessment or the making of demand on him for any fees, fines, costs, dues or assessments shall not constitute or be a waiver of such forfeiture.

"Should any delinquent member, at any time, regain his good standing in the Order, his restoration thereto shall in nowise operate to entitle him or anyone claiming by, through or under him or his certificate of membership or insurance to indemnity or benefits on account of any accident or injury re-

ceived by him while not in good standing, or on account of death resulting therefrom.

"Any member who shall have failed to pay all fees, fines, costs, dues or assessments charged or levied against him when and as the same become due and payable, and who has not restored himself to good standing at or before the time fixed for the next regular meeting of his Subordinate Council after the same shall become due and payable, by paying all such sums due, shall, at such meeting of his Subordinate Council, be suspended from the Order by the Senior Counselor, or, in his absence, by the presiding officer.

"Should any Subordinate Council, however, for any reason, fail at any time to hold its regular meeting, and should there be any member or members thereof at that time who are in default for the payment of any fees, fines, costs, dues or assessment, the Secretary-Treasurer of such Council shall, on the date of such meeting, enter on his books the suspension of all such members so in default, and such suspension shall become and be operative from and as of such date, and such Secretary-Treasurer shall report to the Supreme Secretary and to his Subordinate Council, at the next regular meeting held by it, the name of the member or members so suspended and the date of such suspension.

"The failure to suspend a delinquent member under the provisions of this section shall not constitute

or be a waiver of the forfeiture provided for in this section, and the officer so failing to suspend may be summarily removed from office by the Supreme Counselor."

Art. IV, Sec. 8, p. 57:

"REINSTATEMENTS

"Sec. 8. Any member suspended under the provisions of the foregoing section, desiring reinstatement, shall make application therefor on a blank prepared by the Supreme Executive Committee, to the Council from which he was suspended, and shall accompany such application with a sum equal to the dues for the current period in which he applies for reinstatement, and also one assessment. On the receipt of such application and payment, the Secretary-Treasurer of his Council shall present such request at the next regular meeting of his Council. Each application shall be referred to a committee of three for investigation, upon whose report a ball ballot shall then be taken upon such application, and if not more than two adverse ballots appear, the Senior Counselor shall declare the applicant reinstated to membership."

DEFENDANT'S EXHIBIT "B-6", Adm. Jan. 17, 1940, Supplemental Extracts from the Constitu-

tion and By-Laws of the defendant corporation, effective September 1, 1937.

Art. IV, Sec. 13, p. 47, line 37:

"WAIVERS

"No Grand or Local Council, officer, member or agent of any Local, Grand or the Supreme Council of the Order is authorized or permitted to waive any of the provisions of the Constitution of this Order, relating to insurance, as the same are now in force or may be thereafter enacted."